89-1094

SUPREME COURT, U.S.
FILED
NOV 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

LITTLE EARTH OF UNITED TRIBES, INC. AND LITTLE EARTH RESIDENTS ASSOCIATION, INC.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

LARRY B. LEVENTHAL, ESQ.
Suite 420 - Sexton Building
529 South Seventh Street
Minneapolis, Minnesota 55415
Telephone: (612)333-5747
Counsel of Record for
Petitioners Little Earth of
United Tribes, Inc. and Little
Earth Residents Association, Inc.

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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT**

QUESTIONS PRESENTED

1. Are the rational and procedures and allocation of burden of proof announced by this Court in Price Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1969), as the approach to address mixed motivation in an action considering alleged civil rights violations as to employment also applicable as to consideration of alleged civil rights violations in housing?

2. Is the exercise of discretion by the United States Department of Urban Development, to foreclose upon an insured mortgage, subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §701 et seq. when exercised in an arbitrary and capricious manner?

3. Does wrongful action by a federal agency directed against an urban American Indian housing project offend the American Indian Trust Doctrine?

LISTS OF PARTIES

The parties to the proceedings below include the Plaintiffs Little Earth of United Tribes, Inc. and the Little Earth Residents Association, Inc. Both Plaintiffs are Minnesota Non-profit Corporations.

The named Defendants are United States Department of Housing and Urban Development, which is a Department of the United States of America and Samuel R. Pierce, Jr. in his capacity as Secretary, United States Department of Housing and Urban Development (HUD). Also named Defendants include John Doe and Mary Roe, agents and officials of HUD. Actual individuals were not substituted for John Doe and Mary Roe during the course of the litigation. An additional named Defendant was Donald Omodt, in his

capacity as Sheriff of Hennepin County, Minnesota. Sheriff Omodt was named in that one action intially sought through the litigation was to halt a foreclosure sale announced by the Sheriff and pending. Sheriff Omodt, however, was later dismissed as a party upon agreement by the Plaintiffs and HUD.

There is counter-claim in this matter wherein Samuel R. Pierce, Jr. as Secretary of the Department of Housing and Urban Development counter-claims against Southhigh Non-profit Housing Corporation a/k/a/ Little Earth of United Tribes, Inc. The party against whom the counter-claim was filed is identical to Plaintiff Little Earth of United Tribes, Inc. Southhigh Non-profit Housing Corporation is the former name of the entity.

Petitioners herein seeking this Writ are the original Plaintiffs Little Earth of United States, Inc. and Little Earth Residents Association, Inc. The respondent is United States Department of Housing and Urban Development, and Samuel R. Pierce, Jr. Jack Kemphf has succeeded to the office of Secretary of Housing and Urban Development.

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UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

The Petitioners, Little Earth of United Tribes, Inc. and Little Earth Residents Association, Inc., respectively pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceeding on June 23, 1989.

OPINIONS BELOW

Trial was held in this matter before the Honorable Robert Renner, Judge of the United States District Court for the District of Minnesota, from January 26 through February 13, 1987. The District Court issued its Findings of Fact, Conclusions of Law, Order for Judgment, and Memoranda on October 19, 1987, which appears at 675 F.Supp. 497 (D. Minn. 1987), and which is reprinted within Petitioners Appendix. An amended final Judgment was issued on February 10, 1988, which is included within Petitioners Appendix and is published at 691 F.Supp. 1215.

Petitioners made a timely appeal to the United States Court of Appeals for the Eighth Circuit. On June 23, 1989, a panel of the United States Court of Appeals for the Eighth Circuit issued its

determination affirming the decision by the District Court. This Opinion is published at 878 F.2d 236 and appears within the Appendix. Petitioners petitioned for an en banc hearing from the United States Court of Appeals for the Eighth Circuit which on August 16 1989, was denied. The Order denying the en banc hearing appears within the Appendix.

The District Court issued numerous orders relating to pretrial matters. Published opinions by the District Court herein appear at 584 F.Supp. 1287 (1983); 584 F.Supp. 1292 (1983); 584 F.Supp. 1301 (1983), 675 F.Supp. 497 and 691 F.Supp. 1215. Three opinions from the United States Court of Appeals from the Eighth Circuit were published associated with pretrial matters. These appear at 738 F.2d 310 (1984); 774 F.2d 1172; and 807

F.2d 1433 (1986).

For a recital of the procedural history of this action leading up to the District Court decision see the District Court decision 675 F.Supp. at 499-501.

JURISDICTION

The determination by the United States Court of Appeals for the Eighth Circuit is sought to be reviewed. The determination of the Eighth Circuit panel is published at 878 F.2d 236 and contained within the Appendix. It was filed on June 23, 1989. The panel decision affirmed the determination of the District Court, which appears at 675 F.Supp. 497 (D. Minn. 1987). A Petition for Rehearing with Suggestion of En Banc consideration was filed with the Eighth Circuit and was denied on August 16 1989.

Jurisdiction to review the judgment of the Eighth Circuit in this civil case

by writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(1). This petition for writ of certiorari is timely filed within the 90 day period required by 28 U.S.C. §2101(c), in compliance with Rules 20 and 29.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, AND STATUTE INVOLVED

The constitutional provision herein involved is the Fifth Amendment to the United States Constitution. It provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law".

Application of Title VIII ofthe Fair Housing Act, 42 U.S.C. §3604(b) is at issue. It along with Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) which is discussed are reproduced in the Appendix.

STATEMENT OF THE CASE

Little Earth is a 212-unit housing project in Minneapolis, built in the early 1970's primarily to serve the American Indian community. (Findings of Fact [FF] 2-3 of the District Court as contained and enumerated within its opinion Little Earth of United Tribes, v. U.S. Department of HUD, 675 F.Supp. 497 (1987). It is in the midst of an urban Indian community with one of the most dense American Indian populations in the country. It exists as the only major Urban Indian housing project in the United States. The project was initially developed under HUD's 236 Program, and has been receiving Section HUD subsidies. It is owned by Little Earth of United Tribes, Inc. (LEOUT), a non-profit community-based corporation. A wide variety of community services directed to

the Indian community are centered at the project. (FF. 135-139)

In 1975, after the ownership entity, originally constituted as South High Non-Profit Housing Corporation, had some difficulties, HUD officials requested that a new Board of Directors be selected to govern the project. (FF. 13) The project was in financial default from its initiation and remained so. (FF. 13) The new sponsor relied on assurances that a workout agreement would be achieved. (T. 936-939; Pl. Ex. 47)

Initially HUD officials were quite cooperative in arranging for Section 8 financing as to Little Earth. (FF. 20-22) However, when new local HUD officials took charge, requested rent increases for the project were thereafter set aside with no agency response being made during each of three project years,

1979-80, 1980-81, and 1981-82. (FF. 41, 78, 79, 96, 97) The failure of HUD to grant rent increase on a basis to other projects had a significant adverse impact on project revenue.

Of the 188 projects supported by HUD in similar categories in Minnesota, Little Earth is the only one that was so treated. Others all received, as Agency regulations require, a rent increase pursuant to request, a denial with specific reasons, or an increase pursuant to the annual adjustment factor published in the Federal Register. The result was that the project was essentially starved. Costs kept rising but its budget did not.

HUD did not respond to the Little Earth rent increase requests for the 1979, 1980 and 1981 fiscal years until a September 29, 1981 letter from Thomas Feeney denying such, and stating

foreclosure would be recommended in that "control" of the project had not been transferred to an organization acceptable to HUD. (Def. Ex. 57; FF. 108)

The project was recommended for inclusion in the flexible subsidy program in the report by the local HUD office to Washington which stated that the Board was cooperative. An inspection and review was made of Little Earth, and of the three categories, no check was made in the category demonstrating an immediate need for change. A number of items were in the middle category. (Pl. Ex. 76) Project officials were not informed of the ratings as required by regulation. (FF. 73) Over six months later the project received altered ratings based on the same review, wherein everything from the middle category was shifted to the worse category. (Def. Ex.

75, FF. 75) On another occasion project officials were mailed and asked to sign a Section 8 Agreement represented as identical to that previously signed, but which in actuality would cut rent supports as to every unit and cut contract length by over a year. (FF. 98,99)

While the HUD Area Office included the Little Earth project as part of its application to the HUD National Office under its "Flexible Subsidy Program" to aid needy projects, funds derived were diverted elsewhere despite the local offices knowledge that this would lead to the financial collapse of the project. (FF. 88)

Other questionable actions by HUD occurred also which are described within the Argument section.

Racial implications in HUD's actions

are raised overtly and several documents demonstrate that race played a role in HUD's actions toward Little Earth. A letter was drafted by HUD consultant, Robert Rohlwing, and signed by HUD Area Director Thomas Feeney, wherein the demand is made that an additional business/professional member be appointed to the Board "from outside the American Indian community," which would result in "seven members from outside the community and constitute a majority of the Board." (Def. Ex. 76) Similar thoughts are expressed in the memo by Mr. Rohlwing, dated July 26, 1982, wherein he states, in suggesting a proposed workout agreement, that a million dollar reserve fund might be created but that it would be taken by HUD "in the event the Indians take over the project." (Pl. Ex. 71)

The project owner, Little Earth of

United Tribes, Inc. and the Little Earth Residents Association, Inc. (collectively, "Little Earth") initiated this action seeking to enjoin foreclosure and other injunctive and declaratory relief. Respondents counterclaimed, seeking judicial foreclosure.

This matter has been the subject of published pretrial opinions by the District Court and the Eighth Circuit Court of Appeals which are identified above under the designation "Opinions Below".

The trial court issued its Findings of Fact, Conclusions of Law, Order for Judgment and Memorandum on October 19, 1987, dismissing all of Petitioners' claims and granting HUD's counterclaim for judicial foreclosure. 675 F.Supp. 497 (D. Minn. 1987). An amended final judgment was issued on February 10, 1988,

and Petitioners' appealed.

A panel of the Eighth Circuit Court of Appeals heard argument on May 8, 1989, and filed its decision affirming the District Court on June 23, 1989. The panel affirmed, without discussing Petitioners' arguments other than to list them and upon declaring the District Court decision was based on findings that are not clearly erroneous and that it finds no error of law. En banc review was sought which was denied on August 16, 1989.

REASONS FOR GRANTING THE WRIT

I. THE RATIONAL, PROCEDURES AND ALLOCATION OF BURDEN OF PROOF ANNOUNCED BY THIS COURT IN PRICE WATERHOUSE V. HOPKINS AS THE APPROACH TO ADDRESS MIXED MOTIVATION IN CONSIDERING ALLEGED CIVIL RIGHTS VIOLATIONS IN THE CONSIDERATION OF EMPLOYMENT ARE ALSO APPLICABLE AS TO ALLEGED CIVIL RIGHTS VIOLATIONS AS TO HOUSING.

The District Court and the Eighth Circuit failed to apply the rational and

procedures or allocate the proper burden of proof this Court discussed in Price Waterhouse v. Hopkins, ____ U.S. ____ 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) as the approach to address mixed motivation in an action addressing Civil Rights claims. In Price Waterhouse this Court addressed resolution of mixed motive employment questions arising through the application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq. The Court now has an opportunity to clarify that a similar approach is to be utilized in resolving housing questions featuring mixed motivation arising through the application of Title VIII of the Fair Housing Act, 42 U.S.C. §3604(b).

Discrimination on the basis of race by an Agency of the United States is prohibited by the Due Process Clause of the Fifth Amendment to the United States

Constitution.

HUD treated the American Indian-owned and occupied Little Earth Housing Project in a markedly different fashion than it treated similarly situated financially trouble housing projects. By ignoring the fact the owners had inherited considerable debt and deteriorated conditions, by ignoring rent increase requests for three years, by first applying for and then withdrawing flexible subsidy funding, and by imposing arbitrary and capricious conditions upon the project's operations, HUD contributed in large measure to conditions placing the project on the brink of foreclosure. This series of otherwise inexplicable actions can only be explained by the fact that HUD officials, perhaps not entirely consciously, had come to equate Indian ownership with mismanagement. This

became clear when HUD's repeated demands conditioning financial assistance on a transfer of ownership control, turned out to mean a transfer to a majority "outside the American Indian community." Race played a substantial role in HUD's decisions toward the project.

The trial court rejected claims of race discrimination, reasoning that HUD's actions could be explained without reference to racial concerns. The Eighth Circuit panel, without significant discussion, concurred. In this they erred. In a mixed motive case, should a protected status such as race be a discernible factor in a defendant's decision, the impact of the protected status within decision making must be addressed. In this case, the Court's own findings demonstrate race was a discernible factor. The District Court

and the Eighth Circuit panel both misunderstood the role of the trial court. Their inquiry was not appropriately concluded upon finding that a defendant's actions can be explained without reference to a protected class status. Rather, pursuant to Price Waterhouse v. Hopkins, ____ U.S. ____, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) the court is to require the burden to shift to the defendant and the defendant thereupon has the burden of establishing by a preponderance of the evidence that it would have made the same decision in the absence of taking the protected class identification into account.

The panel and the District Court erred here in three respects. First, to conclude that the actions of HUD Consultant Robert Rohlwing were racist but that they did not infect HUD's

decision-making process is to ignore substantial undisputed evidence of Rohlwing's involvement within the local HUD office. Second, the District Court assumed that its examination was limited to whether HUD adopted a "discriminatory policy" and not to determine whether racial discrimination played a motivating part in HUD's actions toward Little Earth. Third, the panel and the trial court erred in failing to properly allocate burdens of proof.

The District Court largely avoids the effect of its findings suggesting racial discrimination through refusing to attribute the actions of consultant Rohlwing to the Agency itself.

On July 20, 1982, a number of Little Earth board members, residents and Minneapolis city officials met with Rohlwing to discuss options for the

project. (FF. 166) Thereafter, in response to areas of concern set out by Rohlwing, Little Earth submitted to HUD its strategic plans with considerable attachments. (Pl. Ex. 2, FF. 173). Rohlwing reviewed it only briefly and did not determine if it addressed the requirements he identified. He does not know whether anyone else made such an assessment. (FF. 174, Rohlwing Dep. pp. 57-60) The Court concludes, "obviously, no meaningful review was made of this document." (FF. 176) However, Rohlwing drafted for execution by HUD Area Manager Thomas Feeney correspondence "ostensibly in response." (FF. 177) The document (Def. Ex. 76) stated that the Agency would consider postponing foreclosure only should four demands be met, including:

> An approved Board resolution adding one more business/ professional member to the Board from outside the American Indian community. this will result in seven members from outside the community and constitute a majority of the Board.

The District Court finds this letter "disturbing," noting that if "read

literally" it "suggests HUD requires a transfer of control to a non-Indian majority." 675 F.Supp. at 532. The Court notes Feeney's conclusion on reading the document that it was not meant to imply that only non-Indians would be acceptable (FF. 179), thus superseding its conclusion as to the clear import of the words drafted by Rohlwing.

Racial stereotyping was further integrated into the HUD demands within Def. Ex. 76. Since new board member Fred Hanks was a senior accountant, Rohlwing assumed he must therefore be a non-Indian. In fact, the existing board of directors was composed of seven American Indians and five non-Indians. However, since the five new directors were identified only by reference to their professional qualifications within

correspondence directed to Mr. Rohlwing by LEOUT, it was clear that Fred Hanks, a senior accountant for the Salvation Army, was assumed not to be American Indian. (See Def. Ex. 75, pp. 3, 4; App. 218, 219; T. 304, 307).

On July 26, 1982, in a memo to his supervisor within the HUD central office (Pl. Ex. 71), Rohlwing, in suggesting a possible work-out plan, states that a "one million dollar reserve fund" will be the "key ingredient." Specifying a condition the District Court finds to have "clear racial overtones" (FF. 172), Rohlwing states that:

> in the event the Indians take over the project, we would not pay out funds and simply hold for a two- or three-year period at which time we could use the reserves for payments of the surplus cash loan. (Pl. Ex. 71)

The Court concludes, however that "consultant Rohlwing's racist

hypothesizing is not HUD's discriminatory policy." (FF. 172).

Rohlwing in his deposition testimony acknowledges that he essentially used the term "Indian" as a pseudonym for mismanagement. (Rohlwing Dep. pp 33-43, 52)

Rohlwing advises also that the information forming the basis for his recommendations came from local HUD staff. (Rohlwing Dep., p. 15). When asked if he was told that an "Indian board" was not capable of managing a project of this scope, Rohlwing responded, "Not directly . . ." (Rohlwing Dep., p. 24).

Further, it is evident that Rohlwing and HUD staff had fallen prey to stereotypical myths of "wild Indians on the warpath." HUD memoranda laid plans for dealing with violent disturbances with riot control techniques including tear gas despite no evidence of any violence or threats of violence. (FF. 146-147, Ex. 67). In his July 26, 1982 memoranda (Pl. Ex. 71), Rohlwing, without providing any explanation, warns "there have been recent indications that violent

demonstrations may result from HUD's foreclosure action." 1/

1/ The present case represents the sort of knee-jerk stereotyping that this Court has constantly condemned. It is always possible that there are going to be more than one factor motivating any decision. The burden, then, resting with the defendant in each case to prove that the illegitimate motive was not one that compelled the decision. While many corporations and businesses have been able to persuade the Court that legitimate reasons did exist to explain motivating factors, two Supreme Court decisions indicate that when a knee-jerk stereotypical assertion is one of the factors involved, the Supreme Court is quick to condemn.

In Reid v. Reid, 92 S.Ct. 251 (1971), this Court reversed a decision by the Idaho Supreme Court which sustained an order naming the father administrator of an estate over the mother. In Reid, the mother and father were equally qualified to tend to the estate. The Supreme Court held, "to give mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. Id., at 254. Implicit in their holding, the Court emphasized that any relation the statute had to a legislative end is not going to overcome this type of stereotyping.

Similarly, in Craig v. Boren, 97 S.Ct. 451 (1976), the Supreme Court

In so isolating racially motivated expression, the Courts below take a markedly different direction than this Court applied in Price Waterhouse, supra. In Price Waterhouse, this Court held that when a plaintiff in a Title VII case proves that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if

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struck down an Oklahoma statute which prohibited the sale of beer to males under the age of 21 but to women only under 18. In so holding, the Supreme Court stated that "to survive a constitutinal challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Id., at 456. The Court further stated that "Reid has provided the underpinnings for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification." Id., at 457.

it had not taken the plaintiff's gender into account. Id., at 1786, 1792. The Court goes on to say that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. Id., at 1785, and that the critical inquiry, upon shifting the burden to the defendant, is "whether gender was a factor in the employment decision at the moment it was made." Id., at 1785. 2/

The employer in Price Waterhouse, supra at 1794, disputed that sexual stereotyping by the company could be

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2/ The Court, in Price Waterhouse at 19785, specifies its holding as being that "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."

derived, in part, from "persons outside the decision-making chain." Such a contention, this Court declares, "simply ignores" the "critical role" that such comments played in the selection of candidates for partnership in the firm. Likewise, here the District Court and the panel simply ignored the critical role that Rohlwing played and the fact that his "racist hypothesizing" did in actuality become "HUD's discriminatory policy."

The existence of proper motivation by the defendant/employer in Price Waterhouse was not decisive, given the fact that her protected status (gender) played a "motivating part" in the decision which was made. This motivating part in Price Waterhouse consisted not only of the actual motivation of the selection committee, but also comments by

employees who had no selection responsibility but potentially had the ear of the decision makers.

The evidence in the instant case clearly shows that HUD not only relied upon Rohlwing's counsel but engaged him for the purpose of making recommendations to the Agency. Further, within the course of his engagement, he incorporated his thoughts and ideas in correspondence executed by the HUD Area Director specifying criteria that LEOUT must meet in order to escape foreclosure action. Clearly, HUD relied upon Rohlwing's counsel within its actions as to LEOUT far more than Price Waterhouse relied upon persons outside the decision-making chain as to the partnership decision it considered. The "racist hypothesizing" the District Court attributed to Rohlwing must be seen as playing a motivating part of the Agency's actions complained of.

Under Price Waterhouse, when a protected classification played a part in the decision-making process, regardless of whether it was the sole reason, the burden of proof shifts to the defendant who in turn must prove by a preponderance

of the evidence that even if it had not taken the plaintiff's gender into account, it would have reached the same decision.

The lower courts erred in that they assumed that the only task for the trial court was to ascertain if HUD adopted a "discriminatory policy," 3/ and not to determine whether improper discrimination played a motivating part in HUD's actions toward Little Earth as would be required by Price Waterhouse, supra. The United

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3/ The Eighth Circuit had previously specified the test utilized by the District Court in Client's Council v. Pierce, 711 F.2d 1406, at 1409 (1983). However, the analysis it used was somewhat different. Even though the purported discriminator, HUD, presented two neutral explanations for its actions, the Court focused not on those actions but on the evidence of discrimination:

> The possible neutral explanations for the agency's actions concerning changes in the THA's operation - a lack of resources or a desire to supply funds for low-income housing - do not sufficiently negate the strong inference of discriminatory purpose that arises from the objective evidence contained in the agency's own files. 711 F.2d at 1423

States Supreme Court, in Price Waterhouse, supra, considered the proper approach in a Title VII mixed motive employment case. This Court there held that where in an employment decision "gender played a motivating part" a defendant "may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken plaintiff's gender into account." Supra, at 1795.

The approach adopted in the instant case by the District Court, and approved by the Eighth Circuit without significant discussion, as to consideration of allegations of racial discrimination in housing, pursuant to Title VII of the Civil Rights Act of 1964, are at variance with the approach and allocation of burden of proof announced by this Court

in Price Waterhouse, supra, in considering the application of Title VII of the same act as to allegations of employment discrimination where mixed motivation exists. The approach in determining the impact of racial motivation in housing should be similar to determining the impact of gender motivation in employment promotion. Because of the parallel objectives of Title VIII and Title VII, courts have looked to employment discrimination cases for guidance in interpreting fair housing laws. Betsy v. Turtle Creek Associates, 736 F.2d 983, 987 (4th Cir. 1984).

Published Federal cases to date discussing Price Waterhouse, almost uniformly apply such within an employment content related factually to the background from which Price Waterhouse arose. See, Wards Cove Pacing Company

Inc. v. Atonio, ____ U.S. ____, 109 S.Ct. 2115 104 L.Ed.2d 733 (1989) (dissenting opinion by Stevens, J.); Lamphere v. Brown University, 875 F.2d 916 (1st Cir. 1989); Ottauiani v. State University of New York, 875 F.2d 365 (2nd Cir. 1989); Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989); Smith v. Firestone Tire and Rubber Co., 875 F.2d 1324 (7th Cir. 1989); Jones v. Gerwens, 874 F.2d 1534 (11th Cir. 1989); Adams v. Frank, 712 F.Supp. 74 (E.D. Vir., 1989). Only North Mississippi Communications, Inc. v. Jones, 874 F.2d 1064 (5th Cir. 1989) ventures outside the employment sphere and addresses First Amendment considerations.

The guidance of this Court as to the applicability of the Price Waterhouse test in areas apart from employment, including housing would be most useful and would fill an apparent void.

It may, however, be appropriate to judge Agency action herein by a more decisive standard. The Court in Price Waterhouse was concerned with "maintenance of employer prerogatives" of a nondiscriminatory nature, supra, at

1786. Such prerogatives need not be accommodated when the issue is the existence or nonexistence of prohibited discrimination by the government within its housing program. Further, it is appropriate to judge action by an Agency of the United States by a more demanding standard.

As this Court has previously recognized in many housing cases, defendants are often motivated by several different factors, only one of which may be racial discrimination. Village of Arlington Hts. v. Metro Housing Dev., 429 U.S. 252, 265, discussing Washington v. Davis, 426 U.S. 229 (1976).

Arlington Hts. establishes that a plaintiff need not prove race is the sole motivating factor in an equal protection claim.

The District Court's method of analysis of the race discrimination claims did not encompass the proper standard for a mixed motivate case. The Court declared the critical question to be "whether the decision maker's action . . . could not 'reasonably be explained without reference to racial concerns.'"

[4]/ This test, however, does not recognize the possibility that two reasonable explanations for an action can co-exist, one based on race and one not.

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[4]/ In affirming the District Court herein the Eighth Circuit appears to speak contrary to its voice in other discrimination matters presenting mixed motivation.

The Eighth Circuit, sitting en banc, in Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985), observed,

> Every kind of disadvantage resulting from racial prejudice in the employment setting is outlawed. Forcing Bibbs to be considered for promotion in a process in which race plays a discernible part is itself a violation of law, regardless of the outcome of the process. At the very least, such a process "tend[s] to deprive him of an employment opportunity." Section 703(a)(2). 778 F.2d at 1322.

The Eighth Circuit has also recognized that, for claims under the civil rights statutes upon which Plaintiffs are relying, it is improper to force litigants in housing cases to prove racial bias was the only cause of the defendant's actions. Williams v. Matthews Co., 499 F.2d 819, 826 (8th Circ. 1974).

This test, which looks only to the existence of a non-racial motivation, completely overlooks a co-existing illegal racial motivation. This is at variance with Price Waterhouse which directs, not the disregard of discriminatory motivations where other motivation is also present, but rather places the burden upon the defendant upon the showing of such discriminatory motivation even if apparently eclipsed by motivation that is admittedly nondiscriminatory.

An examination of the facts in the instant case demonstrates that race did not play a motivating part within the sequence of complained of actions by HUD. [5]/ This being the case, the District

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[5]/ The District Court erroneously finds plaintiff's "case is dramatically weakened by the fact that HUD granted increases in Little Earth's Section 8 contract rents in 1976, 1977 and 1978

Court concluded its inquiry too soon. An examination should have been had as to whether HUD would have made the same decisions without the racial considerations. In this the agency would

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. . . At the same time, Litle Earth receive[d] Section 8 payments for 100% of its units. Continuing default in the face of such agency largess belies plaintiffs' claim that HUD's administrative decision . . . doomed the project." 675 F.Supp. at 527.

However, the correctness of HUD's treatment before 1979 shows the error of its hostility to Little Earth after 1979. A change of HUD personnel occurred. Previous personnel were committed to a work-out agreement and pleased with the progress at Little Earth. (FF. 53; T. 936-946; Pl. Ex. 47) New personnel were unfamiliar with the project and withheld information. (FF. 67, 68) Prior absence of discrimination does not build up credits to permit future discrimination.

properly have the burden of proof. 6/

6/ Key to Plaintiffs' case was its assertion of consistent different treatment of Little Earth in comparison to other projects considered "troubled" at HUD. After reviewing the evidence presented by Plaintiffs demonstrating how HUD's treatment of Little Earth was both more demanding administratively and less generous financially than similarly financially troubled HUD projects, the District Court observed:

> The Court is unimpressed by plaintiffs' statistical evidence purportedly establishing that LEOUT was singled out for adverse action. The comparisons have little relevance absent critical information regarding each project's financial management, mortgage history, and physical condition. Little Earth was indeed alone among HUD-sponsored projects in Minnesota by being denied rent increases. But this Court concludes that the project's poor physical and financial condition was sufficient justification for exceptional HUD action independent of racial factors. (675 F.Supp. at 533.)

The District Court is saying it needs to know all the potential differences between Little Earth and the other projects to know if the comparison is valid. It faults Plaintiffs for this lack of information, when in fact, HUD

II. IS THE EXERCISE OF DISCRETION BY THE UNITED STATES DEPARTMENT OF URBAN DEVELOPMENT TO FORECLOSE UPON AN INSURED MORTGAGE SUBJECT TO JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §701 ET SEQ. WHEN EXERCISED IN AN ARBITRARY AND CAPRICIOUS MANNER.

The Administrative Procedure Act (APA) was enacted by Congress in order to avoid arbitrary and capricious actions by executive agencies. In general, the APA authorizes review of agency action except where it is clear that judicial review is precluded by statute, or where action is clearly committed to agency discretion by

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had the burden at this stage of answering Plaintiffs' allegations. Plaintiffs had already demonstrated that Little Earth was treated differently from similarly financially troubled projects in a whole host of ways: award of rent increases, notice of rent increase decisions, award of flexible subsidy funding, offers of work-out agreements, imposition of burdensome administrative requirements, and demand for transfers of ownership control. Clearly, at this stage it was up to HUD to show why "each project's financial management, mortgage history, and financial condition" justified more generous treatment.

law. 5 U.S.C. §701(a). The APA explicitly provides for judicial review. 5 U.S.C. §702. 7/

In Motor Vehicle Mfs. Ass'n v. State Farm Mut., 463 U.S. 29, 43, (1983), the Supreme Court articulated the scope of review under the arbitrary and capricious standard. Conceding that the scope of review was "narrow" it noted that "the agency must examine the relevant data and articulate a satisfactory explanation for

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7/ The APA provides at 5 U.S.C. §702(a) that judicial review is available to a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

To the extent necessary the reviewing court:

> shall hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .

its action including a 'rational connection between the facts found and the choice made'." See also, Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 245-246 (1962).

It is precisely the lack of a rational connection between the facts and HUD's actions which forms the basis for Petitioners' APA claims that HUD acted in an arbitrary and capricious manner in its treatment of the project from 1978 onward. HUD's arbitrary and capricious actions in depriving Petitioners' of decisions on rent increase requests for three years, of flexible subsidy assistance, and the benefits of a work-out agreement created a situation where foreclosure of the project became almost inevitable.

In addressing Petitioners' claims,

the District Court turned to United States v. Victory Highway Village, 662 F.2d 488 (8th Cir. 1981), for the standard in applying APA claims in a foreclosure action. It erroneously concluded that, even assuming reviewability, none of Little Earth's claims were relevant defenses to foreclosure. 675 F.Supp. at 527.

In fact, the Court in Victory Highway clearly articulated a standard of review: "the exercise of discretion by HUD to foreclose on an insured mortgage . . . is subject to judicial review under the Administrative Procedure Act (APA) 5 U.S.C. §701. Id., 494. The Court went on to note that §706(2) authorizes the reviewing court to hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law.

Id. 8/

8/ The essential question presented Victory Highway was whether HUD had a right to foreclose after the mortgagor had defaulted not just on the mortgage, but on a subsequent provisional workout agreement as well. The Eighth Circuit concluded that HUD had a right to foreclose on the HUD assigned mortgage in those circumstances. The factual situation presented in Victory Highway is quite different from the case herein.

First, the court in Victory Highway found none of the mortgagor's equitable claims valid. The court below held that HUD had acted in an arbitrary and capricious manner in terms of its procedural treatment of Little Earth's rent increase requests. Secondly, Victory Highway involved HUD in a different role than the one it fulfills with Little Earth. The mortgagor in that case was a profit oriented, private developer. HUD's workout agreements were business arrangements which left HUD free to foreclose if the mortgagor did not comply; the mortgagor violated the workout agreement and HUD rightfully foreclosed. In contrast, Little Earth involves a non-profit Section 8 housing project. Judicial review is especially appropriate to protect non-profit housing providers from arbitrary and capricious action. United States v. Winthrop Towers, 628 F.2d 1028, 1036 (7th Cir. 1980); United States v. Golden Acres, 520 F.Supp. 1073 (D. Del. 1981).

The District Court held that "[t]he record clearly shows that in April, 1980, local HUD officials decided to delay action on all pending [rent increase and budget] . . . request . . . [T]his decision was not communicated to the LEOUT board." By September, 1980, local HUD officials determined that any project rent increases were unjustified because of management problems. "(T)his decision was never conveyed to the LEOUT board." Id., 528-529.

As a result of HUD's arbitrary and capricious conduct, three annual rent increase requests and annual budgets remained in limbo awaiting approval or denial. "[I]t was not until September 25, 1981, that HUD first responded in writing to LEOUT's pending rent increase and budget approval requests." Id., at 529. This was true despite the fact that

"HUD's Insured Project Servicing Handbook requires a written response . . within 30 days . ." (FF. 110).

The trial court described HUD's procedural attitude with respect to the rent increases as "clearly arbitrary and an abuse of discretion; Moreover it was a clear violation of procedures required by HUD's own Insured Project Servicing Handbook." 675 F.Supp. at 529. Despite the Court's harsh indictment, it concluded that: HUD's actions were not judicially reviewable; even assuming reviewability, HUD's decisions were justified because of Little Earth's mismanagement; and finally, that the Court was not in a position to provide a remedy for this particular type of administrative abuse. The Court's conclusions do not, however, withstand

analysis. 9/

This Court has held that "[w]here the rights of individuals are affected it is incumbent upon agencies to follow their own procedures." Morton v. Ruiz, 415 U.S. 199, 235, 94 S. Ct. 1055, 1074 (1974). Even where an official action is of the type which generally involves the

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9/ The District Court relied upon a number of cases in which courts have refused to review the substance of HUD's decisions with respect to rent increases. See e.g., Grace Towers Tenants Association v. Grace Housing Development Fund Co., 538 F.2d 491, 496 (2nd Cir. 1976); Harlib v. Lynn, 511 F.2d 51, 56 (7th Cir. 1975). The cases are readily distinguishable.

Here procedural defects, e.g., adjustment of rent levels, processing of flexible subsidy funding, etc., were at issue. See, Robbins v. Reagan, 780 F.2d 37 (D.C. Cir. 1985); Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. 1974); Marshall v. Lynn, 497 F.2d 643 (D.C. Cir. 1973), cert. den., 419 U.S. 970 (1974); Shanks Village Committee Against Rent Increases v. Carey, 197 F.2d 212 (2nd Cir. 1952).

exercise of discretion, courts have the power to inquire into claims that the agency used procedurally unfair and unauthorized techniques inflicting injury on private citizens. Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574 (3rd Cir. 1979).

The case herein does not involve matters "committed to agency discretion by law." Section 8 contract rent increase procedures are governed by federal regulation and HUD's own Insured Project Servicing Handbook. (See, 24 C.F.R. §886.112 and Def. Ex. 95). The distribution of flexible subsidy monies are similarly governed by detailed regulations which define eligible projects and establish very specific criteria for determining awards. 24 C.F.R. §§219.105, 219.110 (1984). The flexible subsidy program was designed

precisely to provide rehabilitation monies for projects such as Little Earth, which are suffering from financial and management problems.

III. DOES WRONGFUL ACTION BY A FEDERAL AGENCY DIRECTED AGAINST AN URBAN AMERICAN INDIAN HOUSING PROJECT OFFEND THE AMERICAN INDIAN TRUST DOCTRINE.

A trust relationship exists, between the United States and the various Indian Nations and their members, imposing fiduciary duties upon the United States to act in the best interests of the tribes and their members. Programs undertaken in pursuit of this obligation, including those involving Indian preference in the delivery of services, such as housing, are political in nature, not racial and, hence, are not prohibited by the Constitution or civil rights laws. Morton v. Mancari, 417 U.S. 535 (1973).

The exercise of the fiduciary

obligations of the United States are appropriately judged through consideration of this special relationship, United States v. Mason, 412 U.S. 391 (1973). A trust doctrine requiring the United States, or a subdivision thereof, to act in a fiduciary manner as to interests of American Indians has grown out of treaty and other relationships and is generally recognized by the courts. Morton v. Mancari, supra. Accordingly, this Court has upheld Indian preference, associated with the trust relationship characterizing it as being "political" rather than "racial". Mancari, supra, 417 U.S. at 553-554, n.24.

The courts have found the political relationship between the United States and the American Indian nations broad enough to extend benefits arising from

the trust relationship to individual Indians living off of reservations and applicable to states acting to benefit Indians. In Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055 (1974), this Court ordered the Bureau of Indian Affairs to extend general assistance benefits to Indians living off the reservation. In Livingston v. Ewing, 6601 F.2d 1110 (1978), the Tenth Circuit upheld a policy that allowed Indians to sell crafts in the portal area of the Museum of New Mexico located in the City of Santa Fe, but excluded non-Indians from selling at the same location.

Examples of the trust responsibility applied to off-reservation Indian housing include: St. Paul Intertribal Housing Board v. Reynolds, 564 F.Supp. 1408 (D. Minn. 1983); Eric v. Secretary of HUD, 564 F.Supp. 44 (D. Alaska 1978); Alaska

Chapter, Associated General Contractors v. Pierce, 694 F.2d 1162 (9th Cir. 1982).

As the District Court recognized, 675 F.Supp. at 535, this trust obligation creates a fiduciary obligation on the part of the United States Government, including its various agencies, to act in the best interests of the American Indian people generally. United States v. Mason, 412 U.S. 391, 399, 93 S. Ct. 2202 (1973).

The District Court further recognized that the trust relationship extends to individual tribal members living on or off reservations, Morton v. Ruiz, 415 U.S. 199, 237 (1974); St. Paul Intertribal Housing Board v. Reynolds, supra, at 1413-14 (D.Minn. 1983), including Little Earth which "from its inception . . . was intended to, and does serve primarily American Indians", 675

F.Supp. at 535.

The trust doctrine does not require HUD to invest endlessly in a mismanaged project simply because it happens to be Indian. However, in the context of established HUD policies which provided for rent increases, flexible subsidy funding, and workout agreements to a wide range of financially troubled projects with management problems, the trust doctrine requires HUD to affirmatively consider whether granting of any or all these benefits will help to preserve the project as Indian housing. HUD completely failed to do this.

The trust relationship requires that the agency deal fairly on a fiduciary basis with those it is committed to serve. Trust standards are applicable as to a federal agency either associated with or independent of an underlying

statute, Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252 (D.D.C. 1972). Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); Seminole Tribe v. United States, 316 U.S. 286 (1942). Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. (D.D.C. 1972), Revd on other grounds, 499 F.2d 1095, Cert denied, 95 S.Ct. 1351 (1975). See also, American Indian Policy Review Commission, Vol. 1, p. 126, established by Congress in 1975 at 25 U.S.C. §174, report submitted to Congress May 17, 1977.

The record shows a marked failure to do so. Rather the Agency, through a repeated course of conduct, starved the project through failing to grant rent increases while failing to provide reasons for such (FF. 41, 78, 79, 96, 97); withheld information as to project

review and then altering such (FF. 73, 75); requested, but not read when submitted, a detailed plan of remedial action to avoid foreclosure (FF. 173-176); requested signature on a counterpart contract that would cut duration and amount of previously agreed subsidy support (FF. 98, 99); and issued various directives which would limit Indian participation. (See, Section II above.)

While the HUD Area Office included Little Earth as part of a "Flexible Subsidy" Application to the National Office, monies derived from the application were directed elsewhere. Despite the fact that HUD had the discretion to provide flexible subsidy funding to Little Earth it chose not to do so, aware that its denial would result in the financial collapse of the project.

(FF. 57) Local HUD official "Howard Goldman testified that HUD could have 'qualified' Little Earth to get flexible subsidy in early 1981, if Little Earth had met HUD's conditions -- that is, for the LEOUT Board of Directors to divest control of the property to another organization acceptable to HUD." (FF. 88)

On June 16, 1980, physical condition and management review reports prepared by HUD were submitted in support of Little Earth's application. Notwithstanding the fact that a number of items needed action HUD did not release the reports to LEOUT for six months. The Court found such delay "disturbing because it reduced LEOUT's opportunity to respond to negative review findings." The Court found it "[e]ven more disturbing that when the reports were finally released to LEOUT on January 15, 1981, HUD produced a

different version of the management report, ostensibly based on the same May 28 - June 4, 1980, review. (FF. 73, 75)

The falsified management report downgraded the original report to require immediate attention to be taken on 22 items, which the original management report indicated could be corrected within one year. (FF. 75) For HUD to hold onto a report for six months and then to specify that immediate action must be taken upon much of its content, was in itself a gross violation of its fiduciary duties. Subsequent alterations by the Agency compounded the deviation.

The Court missed the point in assuming HUD had not violated the trust doctrine as to displacement because it did not intend the displacement of Indian tenants following foreclosure. 675 F.Supp. at 535. Neither the District

Court or the Eighth Circuit considered that loss of Indian control is likely to be followed by loss of Indian services and eventually Indian residents.

The District Court, however, noted at length the prominent role played by the Little Earth project in promoting Indian religious, social, and political activities, as well as providing housing. (FF. 135-139) Given the fact that HUD proposes to sell the project to the highest bidder, with no requirements that the buyer exhibit any commitment to Little Earth as an American Indian project, there is precious little basis for any confidence that Little Earth will retain its identity.

The Trust Doctrine requires that a Federal Agency making decisions which determine the fate of an American Indian project, must consider the impact of

those decisions on the project's future character as Indian and service to the American Indian community. The record herein is utterly devoid of any indication HUD considered such.

IV. CONCLUSION

Questions of exceptional public importance exist including the proper analysis by a reviewing court and allocation of burden of proof between the parties in a mixed motive housing discrimination case involving Title VIII of the Civil Rights Act of 1964; the scope of review under the administrative PRocedure Act of Agency action leading to foreclosure, and application of the American Indian Trust doctrine.

The approach adopted herein by the District Court and approved by the Eighth Circuit, without significant discussion, as to consideration of allegations of

racial discrimination in housing pursuant to Title VIII, of the Fair Housing Act, 42 U.S.C. §3604(b), are at variance with the approach and allocation of burden of proof recently announced by this Court in Price Waterhouse, supra, in considering the application of Title VIIof the Civil Rights Act of 1964, 42 U.S.C. §2000(e) as to allegations of employment discrimination where mixed motivation exists. The Eighth Circuit does not cite Price Waterhouse.

This is a case of serious allegations of racial discrimination against an agency of the Federal Government. The test applied and approved below did not allow for mixed motive. This Court addressed a similar situation as to discrimination in employment in Price Waterhouse, supra,. The case affords this Court the

opportunity to define the proper approach to be utilized in addressing allegations of housing discrimination.

This Court should grant this Petition for a Writ of Certiorari and review the determinations of the courts below.

Respectfully submitted,

S/

LARRY B. LEVENTHAL, ESQ.
Attorney for Petitioners
Little Earth of United Tribes, Inc. and Little Earth Residents Association, Inc.
Suite 420 - Sexton Building
529 South 7th Street
Minneapolis, Minnesota 55415
Telephone: (612)333-5747